INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia
(ICSID Case No. ARB/12/14 and 12/40)

PROCEDURAL ORDER NO. 9

Provisional measures

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I. PROCEDURAL BACKGROUND

1. The present order deals with an Application for Provisional Measures (the "Application") filed by Churchill Mining Plc and Planet Mining Pty Ltd (the "Claimants") on 27 March 2014, by which the Claimants requested that the Tribunal:

    a. Recommend that the Republic of Indonesia ("Indonesia" or the "Respondent"), its agencies and instrumentalities:

        i. Refrain from threatening or commencing any criminal investigation or prosecution against the Claimants, their witnesses in these proceedings, and any person associated with the Claimants' operations in Indonesia, including their wholly owned subsidiary, PT Indonesia Coal Development (PT ICD), pending the outcome of this arbitration;

        ii. Stay or suspend any current criminal investigation or prosecution against the Claimants' current and former employees, affiliates or business partners pending the outcome of this arbitration;

        iii. Refrain from engaging in any other conduct that would:

            i. Threaten the exclusivity of this ICSID arbitration;

            ii. Aggravate the dispute between the Parties;

            iii. Alter the *status quo*; or

            iv. Jeopardize the procedural integrity of these proceedings; and

    b. Recommend any further measures or relief that the Tribunal deems appropriate in the circumstances to preserve (i) the right to exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention, (ii) the right to the preservation of the *status* quo and the non-aggravation of the

dispute, and (iii) the right to the procedural integrity of the arbitration proceedings.[1]

2. Following the receipt of the Application, the Tribunal invited the Respondent on 2 April 2014 to submit its response to the Application by 16 April 2014. Upon a request for an extension of such time by the Respondent and after having heard the position of the Claimants, the Tribunal agreed on 11 April 2014 to extend the time limit for the Respondent's response until 25 April 2014. The Respondent subsequently filed its response within this time limit.

3. In its Response to the Claimants' Application for Provisional Measures (the "Response"), Indonesia objected to the Application and requested the Tribunal to:

    a. Reject the Claimants' request for provisional measures, as it fails to satisfy the elements to be applied in determining whether to grant provisional measures; and

    b. Award to the Respondent the costs associated with its opposition to the Claimants' Application, including Indonesia's legal and administrative fees and expenses and the fees and expenses of the Tribunal.[2]

4. On 28 April 2014, having reviewed the Parties' submissions, the Tribunal invited the Claimants to submit a reply by 12 May 2014 and the Respondent a rejoinder by 26 May 2014, which the Parties did.

II. POSITIONS OF THE PARTIES

1. Position of the Claimants

5. The Claimants contend that the announcement made by the Regent of East Kutai just days after the Tribunal's Decisions on Jurisdiction of his intention to initiate criminal proceedings "against the Claimants and their witnesses",[3] and the Regent's reported filing on 21 March 2014 of criminal charges against the Ridlatama group on the ground

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[1] Claimants' Application for Provisional Measures, 27 March 2014, ¶ 2.

[2] The Republic of Indonesia's Response to Claimants' Application for Provisional Measures, 25 April 2014, ¶ 76 ; Respondent's Rejoinder to Claimants' Application for Provisional Measures, 27 May 2014, ¶ 64.

[3] Application, ¶ 16.

of forgery of official documents "are not a good faith exercise of sovereign powers, but rather a calculated act designed to obstruct or derail these ICSID proceedings".[4] According to the Claimants, the timing of the investigation "leaves no doubt that it is a tactical response to this Tribunal's decision to scrutinize the merits of the Claimants' claims".[5]

6. In the Application, the Claimants allege that Indonesia has "reacted impetuously" to the Tribunal's Decisions on Jurisdiction by engaging in "strong-arm tactics" targeted at intimidating or otherwise destabilizing the Claimants' witnesses and potential witnesses, thus "seeking to usurp the jurisdiction of this Tribunal".[6] Specifically, the Claimants call on the Tribunal to recommend that Indonesia refrain from threatening or commencing any criminal investigation or prosecution against the Claimants, their witnesses in these proceedings, or any other person associated with the Claimants' operations in Indonesia.

7. For the Claimants, at the hearing on jurisdiction lead counsel for Indonesia made explicit threats of criminal investigation and prosecution against the Claimants' witnesses and potential witnesses, including the Claimants' current and past employees still residing in Indonesia.[7] He also made "a clear and direct threat" to one of the Claimants' key witnesses, Mr. Paul Benjamin. He did not refer to him as a mere "cooperating witness" as now alleged by Indonesia, but insisted that Mr. Benjamin would be accused of a serious crime as "the one who arrange[d] control of all the quote unquote production of that document".[8] Upon a close review of the transcript of the hearing, it becomes clear that "Mr. Dermawan intended to intimidate, harass, and put undue pressure and influence on the Claimants and their witnesses".[9]

8. Relying on Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, the Claimants assert that the Tribunal is empowered to recommend the provisional measures it seeks, in particular the preservation and protection of the rights

4 Application, ¶ 20; Reply, ¶ 18.
5 Reply, ¶ 18.
6 Application, ¶ 1.
7 Reply, ¶ 8.
8 Reply, ¶ 10, citing Mr. Dermawan's comments at the hearing, at Tr. 14052013, 153:16-18.
9 Reply, ¶ 11.

which they assert in these proceedings, and which run the risk of being destroyed or seriously prejudiced by the actions of the Respondent.[10]

9. In reliance on arbitral decisions, the Claimants submit that the requirements for provisional measures are (i) that the Claimants have rights requiring protection by this Tribunal, (ii) that the requested measures are urgent, and (iii) necessary. They add that some tribunals have in addition applied a *prima facie* test on the likelihood of success on the merits and enquired whether the requested measures would disproportionately burden the other party. At any rate, the Claimants submit that they satisfy all the requirements and that this Tribunal should therefore grant the provisional measures sought.

a. Rights requiring protection

10. For the Claimants, the power of the Tribunal to grant provisional measures is "very broad" and extends to procedural rights in addition to substantive rights.[11] Pending the outcome of the arbitration, the rights that are subject to the arbitration must be protected if necessary by provisional measures. The Claimants submit that Indonesia's threats to commence criminal proceedings imperil three types of self-standing rights: (i) the right to the exclusivity of these ICSID proceedings; (ii) the right to the preservation of the *status quo* and the non-aggravation of the dispute; and (iii) the right to the procedural integrity of the arbitration proceedings.

11. It is through the actions of Indonesia that these rights "imminently stand to be violated" with respect to "actual and potential witnesses".[12] While acknowledging that these witnesses and potential witnesses are not parties to these proceedings and thus not vested with these rights, the fact that the Claimants seek the protection of these rights "does not amount to arguing that the non-parties in question also hold the same rights".[13]

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[10] Application, ¶ 25.
[11] Application, ¶ 27.
[12] Reply, ¶ 30.
[13] *Id*.

i. Right to exclusivity of the ICSID proceedings

12. The Claimants submit that Article 26 of the ICSID Convention "establishes the autonomy and exclusivity of ICSID arbitration from local administrative or judicial remedies".[14] According to the Claimants, Indonesia's threats and initiation of criminal proceedings on the basis of allegations of forgery are inconsistent with Article 26 of the ICSID Convention. This is so because the allegations of forgery now investigated in Indonesia are the same allegations as those put forward by Indonesia as a defense in these ICSID proceedings.

13. The Claimants refer to decisions in which tribunals have enjoined pending court proceedings in order "to preserve a party's right to have the dispute decided by an international tribunal without having its rights eviscerated before an award on the merits".[15] In *Quiborax* and *Burlington*, the tribunals held that there could be no doubt that the right to exclusivity of ICSID proceedings may be protected by provisional measures.[16] Criminal investigations and prosecution are prohibited under Article 26 of the ICSID Convention "if they relate to the subject matter of the base before the tribunal and not to separate, unrelated issues or extraneous matters".[17] Since the question of allegedly forged documents squarely falls within the subject matter of the present dispute, Indonesia must await the resolution by this Tribunal and refrain from pursuing local proceedings, in particular criminal proceedings focused at obtaining evidence in support of their defense strategy.[18]

14. For instance, the *CSOB* tribunal recommended the suspension of bankruptcy proceedings on the grounds that the latter may deal with matters before the tribunal.[19]

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14 Reply, ¶ 48.

15 Reply, ¶ 49.

16 Application, ¶¶ 31-32, citing *Quiborax S.A., Non Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia ("Quiborax v. Bolivia")*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 127 (**Exh. CLA-170**); and *Burlington Resources Inc. & Ors. v. Ecuador & Empresa Estatal Petróleos del Ecuador (PetroEcuador) ("Burlington v. Ecuador")*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 57 (**Exh. CLA-173**).

17 Application, ¶ 33, referring to *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶ 23 (**Exh. CLA-177**); and *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 11 (**Exh. CLA-176**).

18 Application, ¶ 37.

19 Reply, ¶ 50, referring to *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic ("CSOB v. Slovak Republic")*, ICSID Case No. ARB/97/4, Procedural Order No. 4, 11 January 1999 (**Exh. CLA-178**).

So too in *Zhinvali*, the tribunal recommended the stay of local proceedings found to be in violation of Article 26 of the ICSID Convention.[20]

15. In the present case, the allegations of forgery made by Indonesia in the criminal investigation are identical to those that Indonesia appears to intend to raise in these ICSID proceedings. Resorting to local proceedings after having raised the issue of forgery in the ICSID arbitration breaches Article 26 of the ICSID Convention; Indonesia is not at liberty to resort to domestic proceedings unless and until the Tribunal renders is final ruling.[21]

ii. Right to the preservation of the status quo and the non-aggravation of the dispute

16. The Claimants invoke a right to be free of criminal proceedings or threats of such proceedings and of any undue influence exerted by Indonesia on the Claimants' witnesses. Furthermore, the Claimants also invoke the right to present their claims before this Tribunal "unobstructed by intimidation or detention of their witnesses".[22] In light of the fact that the criminal proceedings threatened and initiated are "clearly motivated by and aimed at the present arbitration", the requested measures would ensure the preservation of the *status quo* and prevent the aggravation of the dispute.

17. Various tribunals have recognized the right to the preservation of the *status quo* and the non-aggravation of the dispute, in particular to avoid the "continued harassment and intimidation" such as the one faced by the Claimants, their witnesses, and "persons associated with the Claimants' investment in Indonesia".[23] In *Burlington*, the tribunal

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[20] Reply, ¶ 40, referring to *Zhinvali Development Ltd. v. Republic of Georgia ("Zhinvali v. Georgia")*, ICSID Case No. ARB/00/1, Award, 24 January 2003, ¶ 45 (**Exh. CLA-194**).

[21] Reply, ¶ 51.

[22] Application, ¶ 46.

[23] Application, ¶ 40, referring to *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, P.C.I.J. Series A/B No. 79, Order of 5 December 1939, ¶ 24 (**Exh. CLA-180**); *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, ¶ 103 (**Exh. CLA-182**); *Amco Asia v. Indonesia*, Decision on Provisional Measures, 9 December 1983, ¶ 5; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 40 (**Exh. CLA-172**); *Occidental Petroleum Corporation & Ors. v. Ecuador ("Occidental v. Ecuador")*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 96 (**Exh. CLA-183**); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, ¶ 135 (**Exh. CLA-184**); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 117 (**Exh. CLA-170**).

held these rights to be "self-standing" rights,[24] and in *City Oriente*, the tribunal ordered Ecuador to stop pursuing administrative and criminal proceedings as a means to pressure the claimant.[25]

18. In addition to Mr. Benjamin, whom lead counsel of Indonesia directly threatened of criminal investigation at the hearing on jurisdiction, current and former employees of the Claimants still working and residing in Indonesia and certain of the Claimants' key witnesses, such as Messrs. Gunter, Gartman and Gibbs, are presently at risk of criminal investigation. This causes "extraordinary stress and mental anguish to the Claimants and their witnesses",[26] and it is reasonable to presume – so the Claimants submit – that the same is also true of "all persons currently or previously associated with the Claimants' investment in Indonesia".[27]

iii. Right to the procedural integrity of the arbitration proceedings

19. The Claimants maintain that Indonesia's threat and initiation of criminal proceedings will substantially, if not totally, impair their access to witnesses and evidence and thereby affect their due process right to present their case.[28]

20. Arguing that the factual scenario in *Quiborax* is "directly analogous" to the present one, the Claimants stress that the *Quiborax* tribunal acknowledged that criminal proceedings could indeed prejudice the capacity of a party to present its case, in particular with respect to its access to documentary evidence and witnesses. The *Quiborax* tribunal also noted the troubling effect of criminal proceedings on potential witnesses and their willingness to cooperate in arbitral proceedings.[29] Just as in *Quiborax*, Indonesia's use of its criminal system threatens the integrity of the ICSID proceedings.

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24 *Burlington v. Ecuador,* ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60 (**Exh. CLA-173**).

25 Application, ¶ 45; Reply, ¶¶ 54-57, referring to *City Oriente Limited v. The Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (PetroEcuador) ("City Oriente v. Ecuador")*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 62 (**Exh. CLA-181**).

26 Application, ¶ 47.

27 *Id.*

28 Application, ¶ 49.

29 Application, ¶¶ 50-55; Reply, ¶¶ 61-65, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010 (**Exh. CLA-170**).

21. The fact that none of the Claimants' witnesses has been prosecuted or imprisoned to date does not distinguish the present case from *Quiborax*, since the main purpose of provisional measures is to preserve the *status quo* pending a decision on the merits, *i.e.*, to ensure that no irreparable harm occurs in the first place. In any event, Indonesia's filing of criminal charges against Ridlatama on 21 March 2014 is sufficient to demonstrate that the threats proffered at the hearing on jurisdiction against Mr. Benjamin "were not merely hot air". Therefore, the Claimants are "deeply concerned" that Indonesia will shortly initiate criminal proceedings against them, their local subsidiary PT ICD, and their witnesses or potential witnesses.[30]

22. In *Quiborax*, while the tribunal found a threat to the procedural integrity of the arbitration to exist, it specifically declined to award provisional measures to preserve the *status quo* and prevent the non-aggravation of the dispute on the grounds that the claimants had ceased all activities and presence in Bolivia at the time when the criminal proceedings were instituted and that the targets of the criminal proceedings were no longer living in Bolivia.[31] By contrast, in the present case, the Claimants are still present in Indonesia and several of their witnesses and potential witnesses, including Messrs. Benjamin, Gunther, Gartman and Gibbs, still reside and work in Indonesia.[32]

23. According to the Claimants, "Indonesia's threats already caused disruption during the Hearing on Jurisdiction, and the Regent of East Kutai's renewed and publicized threats and actions have aggravated the dispute and caused apprehension among the Claimants' witnesses, who are liable to become unavailable upon the formal filing of criminal charges against them".[33] In conclusion, the Claimants argue that there is a "clear and imminent threat" to the integrity of the proceedings, most notably to the Claimants' right to access evidence and present their case through witness testimony.[34]

[30] Application, ¶ 58.
[31] Reply, ¶ 66.
[32] Reply, ¶ 67.
[33] *Id.*
[34] Application, ¶ 59.

b. *Prima facie* case

24. Referring to the *Paushok* decision, which undertook a *prima facie* review of the merits as alleged in the claimant's memorial,[35] the Claimants submit that the factual and legal bases set out in the Claimants' Memorial and the present application establish a *prima facie* case on the merits, thus fulfilling this particular requirement for the granting of provisional measures.[36]

c. Urgency

25. For the Claimants, there is "real urgency" for this Tribunal to recommend the requested provisional measures, since there is a "real risk that action prejudicial to the rights" of the Claimants might be taken before the Tribunal could make its final determination. The filing of criminal charges against Ridlatama combined with the continued threat of criminal proceedings against the Claimants and their witnesses "will result in imminent harm" to the Claimants and their witnesses, thus making the requested measures urgent.[37]

26. As stated in *Quiborax*, the measures seeking to protect the Tribunal's jurisdiction, maintain the *status quo*, prevent the aggravation of the dispute, and protect the integrity of the arbitration, are "urgent by definition".[38] Or, as noted in *Burlington*, "when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition".[39]

27. Hence, the threshold for proving urgency "is low and can be met if the underlying right to be protected is of high importance".[40] In the present situation, like in *City Oriente*, the threat and initiation of the criminal investigations exercise pressure aggravating and

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[35] *Sergei Paushok & Ors. v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 55 (**Exh. CLA-186**).

[36] Application, ¶¶ 60-61.

[37] Application, ¶ 64.

[38] Application, ¶ 65; Reply, ¶ 77, citing *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 153 (**Exh. CLA-170**); and further referring to *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 69 (**Exh. CLA-181**)..

[39] *Id.*, citing *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 74 (**Exh. CLA-173**).

[40] Reply, ¶ 76.

extending the dispute, while at the same time impairing the rights which the Claimants seek to protect.[41]

d. Necessity

28. The Claimants submit that the requirement of necessity is fulfilled if the provisional measures are required to "avoid harm or prejudice being inflicted upon the applicant".[42] The Tribunal should follow the standard enshrined in Article 17A of the UNCITRAL Model Law and applied by the *Quiborax* tribunal pursuant to which "harm not adequately repaired by an award of damages is likely to result if the measure is not ordered" and satisfy itself that such harm "substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".[43]

29. The Claimants further contend that Indonesia's actions will necessarily cause harm which could not be adequately repaired by an award on damages, since they will not have access to evidence and witnesses to support their case. The requested measures are also proportional since the Claimants would suffer irreparable harm while Indonesia would incur no harm if the criminal proceedings are stayed. Indeed, Indonesia would be at liberty to investigate and prosecute eventual crimes once this arbitration concludes, as Indonesia conceded at the hearing on jurisdiction when it indicated that the statute of limitations for the offences now alleged by Indonesia is 12 years.

30. Moreover, the Respondent's own account of its criminal procedure shows that the Claimants' will suffer irreparable harm. As acknowledged by the Respondent, during a criminal investigation, the investigative authority is competent "to carry out an examination, to arrest, place in custody, search, seize documents and summon a person to be heard or examined as a suspect or witness".[44] Further, once the investigation is completed, the prosecutor may file a letter of indictment "with a request that the case

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41 Reply, ¶ 80.

42 Application, ¶ 67, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 155 (**Exh. CLA-170**); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 8 (**Exh. CLA-176**).

43 Application, ¶ 67.

44 Reply, ¶ 20, citing Response, ¶ 19.

be promptly adjudicated".[45] Hence, "persons associated with Ridlatama, and potentially other important witnesses in this arbitration, could have their documents seized and could be searched or summoned, arrested and placed in custody".[46] For instance, under the Indonesian criminal procedure, a person suspected of document forgery may be detained during the investigation for up to 60 days; upon assignment of the case to the prosecutor, a further 50 days; and if the matter reaches a court, the trial judge may extend the detention up to 90 days; the Court of Appeal may then do so for 90 additional days; and the Supreme Court an additional 110 days; totaling potentially 400 days of detention prior to a final and binding decision.

31. In this context, Indonesia's attempts to dismiss the anxiety now incurred by the Claimants' witnesses disregard not only the legal consequences attached to a criminal investigation, but also Indonesia's own "dismal record in affording due process to individuals under police investigation".[47] The Claimants point to two reports by Amnesty International referring to excessive police violence and other human rights violations.[48] It is therefore incorrect for the Respondent to state that the Claimants' witnesses need only "fear the prospect of giving evidence". While the Claimants' witnesses do not fear answering Indonesia's unfounded allegations, they "must and do fear police raids and abuse, property seizure and loss of their personal liberty for many months even if they have committed no crime".[49]

32. As to the Respondent's argument that the requested measures would immunize entities or individuals having committed a crime, the Claimants retort that Indonesia itself acknowledged at the hearing that the statute of limitations for the crime of document forgery is 12 years. Hence, there can be no question of immunity since "Indonesia will still be able to exercise its power to investigate and prosecute alleged crimes upon the conclusion of the ICSID proceedings".[50]

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[45] Reply, ¶ 20, citing Response, ¶ 22.

[46] Reply, ¶ 21.

[47] Reply, ¶ 23.

[48] Reply, ¶ 23, referring to Amnesty International, "Excessive Force: Impunity for Police Violence in Indonesia", p. 2 available at http://www.amnesty.org/en/library/asset/ASA21/010/2012/en/4e9322f8-5dd3-4e81-9f6b-3be702934d5e/asa210102012en.pdf (**Exh. C-371**); Amnesty International, "Annual Report 2013: The state of the world's human rights", p. 1 available at http://www.amnesty.org/en/region/indonesia/report-2013#page (**Exh. C-372**).

[49] Reply, ¶ 24.

[50] Reply, ¶ 25.

33. Finally, the Respondent is wrong to assert that provisional measures are confined to situations where specific performance is required. Indonesia's reliance on *Plama*, *Cemex* and *Occidental* is misleading, since Indonesia's position has been explicitly rejected in various cases, such as *Paushok* and *Saipem*, where the concepts of "substantial" or "irreparable" harm have been deemed flexible and "not necessarily requir[ing] that the injury complained of be not remediable by an award on damages".[51] By contrast, in *Cemex*, the claimants sought to prevent Venezuela from seizing maritime vessels and financial assets while admitting that the only consequence of the seizure would be a financial loss. Similarly, in *Plama* and *Occidental*, the respondent's actions "merely increased the monetary damages resulting from an already existing dispute".[52] In "sharp contrast" to these three cases, the criminal investigation initiated by Indonesia impairs the Claimants' right to procedural integrity, "in particular with respect to their access to evidence, the unfettered freedom and willingness of witnesses to testify, and their fundamental due process right to present their case generally".[53]

34. In conclusion, the Claimants submit that "Indonesia's attempt to intimidate the Claimants and persons related to their investment in Indonesia by criminal prosecution is an unacceptable means of obstructing the ICSID proceeding that must not be permitted".[54] Pointing to *Himpurna*, the Claimants further allege that this is not the first time that Indonesia has sought to "undermine or derail" ongoing arbitration proceedings. Indonesia, so the Claimants submit, has "no protectable right to threaten or actually pursue criminal proceedings for an illicit purpose such as intimidation, undue influence, or other ulterior motives".[55] Accordingly, the Tribunal should grant the Claimants' requested provisional measures.

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[51] Reply, ¶¶ 70-72, citing *Sergei Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 39 (**Exh. CLA-186**); and referring to *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures, 21 March 2007, ¶ 182 (**Exh. CLA-171**).

[52] Reply, ¶ 73, referring to *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela ("Cemex v. Venezuela")*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 58 (**Exh. RLA-138**); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 46-47 (**Exh. CLA-172**); and *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 98 (**Exh. CLA-183**).

[53] Reply, ¶ 74.

[54] Application, ¶ 72.

[55] *Id.*

2. Position of the Respondent

35. According to Indonesia, the Claimants are wrong to allege that the criminal investigation initiated upon the request of the Government of the Regency of East Kutai is a "strong-arm tactic" used to derail or obstruct the present proceedings.[56] Nor is this action taken impetuously "in bad faith and for no legitimate purpose".[57] In addition to the 2009 BPK Audit Report that already identified indications of forgery, further concerns have surfaced regarding other documents produced by the Claimants in the course of this arbitration, making recourse to criminal proceedings inevitable under Indonesian law.

36. For the Respondent, the criminal investigation is "the only proper way to get to the bottom of this matter", which "would have been initiated even if the Tribunal had declined to exercise jurisdiction".[58] Indonesia adds that this is so "because only the competent Indonesian authorities have access to all of the witnesses, including the Ridlatama companies and their principals, and only they have the powers to investigate and prosecute violations of the applicable Indonesian laws".[59] The Claimants also err in charging Indonesia with bad faith or intimidation, pointing to the absence of evidence of any purported pressure, harassment or undue influence of their witnesses. The criminal investigation initiated in March 2014 is at the first stages; it is "sheer speculation" to predict its outcome "and certainly impossible to show that it will in any way derail or obstruct this Arbitration".[60]

37. For Indonesia, none of the proposed provisional measures is warranted under applicable legal standards. Only the right to the integrity of the arbitration is arguably implicated in this case. However, the Claimants have failed to show that the inchoate criminal investigation "has impinged in any way on the ability of Claimants to present their case to this Tribunal".[61] The Respondent recalls that arbitral tribunals have

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56 Response, ¶ 2.
57 Response, ¶¶ 2-3.
58 Response, ¶ 3.
59 *Id*.
60 Response, ¶ 4.
61 Response, ¶ 6.

stressed that provisional remedies are extraordinary measures which should not be granted lightly, in particular when it comes to restraining a sovereign to investigate and prosecute crimes within its jurisdiction.[62] The burden of showing that provisional measures are urgent and necessary to avoid irreparable harm rests with the Claimants. Where evidence is lacking, the requested measures must be denied.[63]

38. The Respondent further characterizes the breadth of relief sought as extraordinary and going "well beyond what has ever been ordered by an ICSID tribunal in comparable circumstances", since it would "essentially immunize potentially criminal actors for an indefinite number of years".[64] The fact that the Claimants seek to include within the reach of the requested measures the Ridlatama companies and principals, who – according to the Respondent – "are the most likely culprits of any wrongdoing" shows that the Claimants pursue an agenda going "well beyond preserving the procedural integrity of this Arbitration".[65]

39. The Respondent argues that the investigation and prosecution of crimes committed within the territory of the Republic of Indonesia are "unquestionably core functions of the sovereign", which neither the ICSID Convention nor the BITs at issue seek to limit.[66] To the contrary, respect for national sovereignty is clearly enshrined in Rule 39 of the Arbitration Rules, as recalled by commentators.[67] As stated in *Quiborax*, criminal proceedings fall outside the scope of ICSID's jurisdiction or the Tribunal's

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[62] Response, ¶ 29; Rejoinder, ¶ 24; referring to *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2009, ¶ 32 (**Exh. RLA-128**); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶¶ 59 (**Exh. CLA-183**); *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 33-34 (**Exh. CLA-172**); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.17 (**Exh. RLA-129**); *Sergei Paushok v. Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 39 (**Exh. CLA-186**); *Burimi SRL and Eagle Games SH.A v. Albania ("Burimi v. Albania")*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶ 34 (**Exh. RLA-130**).

[63] Response, ¶ 32; Rejoinder, ¶ 24, referring *i.a.* to *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, ¶ 75 (**Exh. RLA-133**); *Tanzanian Electric Supply Co. Ltd. v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, 20 December 1999 (**Exh. RLA-139**).

[64] Response, ¶ 7.

[65] *Id.*

[66] Rejoinder, ¶ 36.

[67] Rejoinder, ¶ 35, citing Y. Fortier, *Interim Measures: An Arbitrator's Provisional Views*, Fordham Law School Conference on International Arbitration and Mediation, 16 June 2008, pp. 5-6 (**Exh. CLA-192**), and further referring to C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), p. 758 (**Exh. RLA-152**).

competence.[68] And in *Caratube*, the tribunal established that "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state".[69] Such a high standard is indeed appropriate since a recommendation to suspend an investigation or to refrain from prosecuting purported crimes "creates a vacuum of authority, which functions as zone of immunity".[70]

40. In addition, the Respondent submits that the factual circumstances do not warrant provisional measures.

41. First, the remarks of Counsel at the hearing on jurisdiction can hardly be characterized as a "threat" or a "campaign".[71] Counsel merely confirmed Indonesia's "long-standing intention" to initiate a criminal investigation into the "Ridlatama forged documents", which had only been deferred because Indonesia expected a swift dismissal of the ICSID arbitrations. As to Mr. Benjamin's role, Counsel only stated that his role with respect to the licenses had been put "on the record" and that he should "be prepared to explain the irregularities identified in the documents".[72]

42. Second, as to the timing of the investigation, it is clear from Mr. Dermawan's comments at the hearing, that the decision to commence a criminal investigation had already been taken. The fact that it was deferred while the jurisdictional objections were pending "is of no moment".[73] In any event, the Claimants themselves acknowledged at the hearing that "the irregularities in the license documentation, if indicative of forgery, warrant criminal investigation".[74] In the end, "Claimants cannot be in a better position today than they would have been if the request for a criminal inquiry had been initiated immediately after the Hearing".[75]

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68 Rejoinder, ¶ 36, citing *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 129 (**Exh. CLA-170**).

69 Rejoinder, ¶ 37, citing *Caratube v. Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, ¶ 137 (**Exh. RLA-133**)

70 Rejoinder, ¶ 38.

71 Rejoinder, ¶ 8.

72 Rejoinder, ¶ 10.

73 Rejoinder, ¶ 11.

74 Rejoinder, ¶ 12, referring to Tr. 14052013, 105:16-17 ("No issue was taken against the claimants in two and a half or more years, until we get the allegations being suggested in the context of these proceedings, that these documents are not authentic in some way, when there has been plenty of opportunity to investigate it").

75 Rejoinder, ¶ 11.

43. Third, the Claimants are wrong when they state that being subject to criminal investigation and possible detention constitutes by definition irreparable harm. The Claimants' reliance on two Amnesty International reports is to no avail since these reports deal with very different circumstances involving mass protests and do not deal with so-called "white collar" crimes.[76] Furthermore, to the Claimants' argument regarding the chilling effect on potential witnesses the Respondent answers that the "Claimants cannot possibly be prejudiced by an investigation of the Ridlatama principals" whom Churchill itself has described as "sharks" in the context of its various lawsuits against Ridlatama.[77] In addition, Mr. Benjamin has not been accused of a crime, nor have the Claimants alleged that he has been interrogated by the police or "told that he is anything more than a witness".[78] The fact that his conduct will be scrutinized "does not mean that his rights will be abused or that he will be prevented from testifying" in the present proceedings.[79]

44. Fourth, granting the relief sought by the Claimants could amount to complete immunity from criminal investigation and prosecution "for all of the Churchill/Ridlatma 'business partners'",[80] and would inflict irreparable harm on the Respondent by precluding it to uncover "evidence that would be relevant, and perhaps decisive, for the merits of this arbitration".[81] Thus, by granting the requested measures the Tribunal would in fact be prejudging the merits of this dispute.[82]

a. Rights for which protection is requested

45. The Claimants' choice to structure the Application by repeating the same arguments presented in the *Quiborax* case is of no assistance because the tribunal in that case (i) rejected similar arguments "on grounds that equally apply here" and (ii) granted provisional measures for exceptional circumstances not present here. For the Respondent, *Quiborax* is not at all analogous to the present case and does not support the extraordinary relief sought by the Claimants.

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76 Rejoinder, ¶¶ 16-17.
77 Rejoinder, ¶ 18.
78 Rejoinder, ¶ 19.
79 *Id.*
80 Rejoinder, ¶ 22.
81 Rejoinder, ¶ 21.
82 *Id.*

i. The right to the exclusivity of ICSID proceedings

46. For the Respondent, Article 26 of the ICSID Convention is not infringed through the initiation of criminal proceedings by the Regent of East Kutai, since "there are two exclusive remedies to be obtained from two distinct forums".[83] The jurisdiction of Indonesia's criminal authorities and that of this Tribunal do not overlap; and both "possess distinct legal competence over their respective matters".[84]

47. The Respondent explains that the Claimants have no ongoing business activities in Indonesia and only seek monetary damages as remedy in this arbitration. In contrast, the purpose of the criminal investigation is "to uncover the truth about the suspect documents utilized by the Ridlatama group to carry out its mining business".[85] While no criminal charges have yet been asserted, the remedy would be criminal sanctions, which fall beyond the jurisdiction of this Tribunal.

48. The Claimants' reliance on *Tokios Tokelés*, *CSOB* and *Zhinvali* is ill-founded. Although, in a first order the CSOB tribunal directed the Ukrainian authorities to abstain from, suspend or discontinue, any proceedings before domestic courts, it thereafter refused to uphold a request to stop criminal proceedings against the general director of the claimant's subsidiaries in Ukraine.[86] For the Respondent, the Claimants' failure to quote *Quiborax* on this particular issue is noteworthy. In that case, the tribunal held that the exclusivity of ICSID proceedings does not extend to criminal proceedings, since the latter deal with matters outside ICSID's jurisdiction.[87]

49. According to the Respondent, the Tribunal should follow other tribunals and look to "the nature of the causes of action and relief sought in the investment arbitration". For instance, the *CSOB* and *Zhinvali* tribunals held that the domestic proceedings infringed

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83 Response, ¶ 54.
84 Response, ¶ 55.
85 *Id*.
86 Response, ¶ 53.
87 Response, ¶ 55, citing *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 128-129 (**Exh. CLA-170**).

Article 26 of the ICSID Convention because these proceedings dealt with the same issues as those before those submitted to arbitration, a situation that must be distinguished from the present one.[88]

ii. The right to the preservation of the status quo and non-aggravation of the dispute

50. The Respondent submits that the right to the preservation of the *status quo* and non-aggravation of the dispute is subject to the requirements of necessity and urgency to avoid irreparable harm.[89] Here, the Claimants "fail to explain how the forgery investigation alters the *status quo* and aggravates the dispute in such a way that it impedes their ability to present their treaty claim before this Tribunal".[90]

51. Various tribunals have insisted on the requirements of necessity and urgency. For instance, the *Plama* tribunal held that the *status quo* must be preserved "when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief".[91] Therefore, argues the Respondent, "a party's entitlement to preserving the *status quo* and non-aggravation of an arbitration proceeding is ancillary to the requirements for issuing provisional measures under Article 47 of the ICSID Convention".[92]

52. The Respondent also points to the case law of the Permanent Court of International Justice (the "PCIJ") and its successor, the International Court of Justice (the "ICJ"), where the right to preserve the *status quo* and non-aggravation was recognized, albeit in the context of "non-commercial cases involving potential loss of human life, threat of armed aggression, fear of genocide or on-going humanitarian violations, none of which could be remedied by monetary compensation".[93] Significantly, in *Pulp Mills*,

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[88] Rejoinder, ¶ 49, referring to *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4, 11 January 1999 (**Exh. CLA-178**); *Zhinvali v. Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (**Exh. CLA-194**).

[89] Response, ¶ 57, referring to *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 61 (**Exh. CLA-183**).

[90] Response, ¶ 56.

[91] Response, ¶ 58, citing *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶ 45 (**Exh. CLA-172**); also referring to *Cemex v. Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 61 (**Exh. RLA-138**).

[92] Response, ¶ 58.

[93] Response, ¶ 59.

the ICJ refused to indicate provisional measures relating to the non-aggravation of the dispute since it found no imminent risk of irreparable harm.[94]

53. The Claimants' reliance on *Quiborax* and *City Oriente* is ill-founded; these cases must be distinguished. Even if *Quiborax* and others recognize that the right to preserve the *status quo* and non-aggravation is a a "self-standing right", that tribunal held that the criminal proceedings did not alter the *status quo* and therefore did not order provisional measures on this ground.[95] The same is true of *Burlington*, which recognized the self-standing nature of the right in question, but noted that its preservation through provisional measures was only warranted if urgent and necessary.[96] *City Oriente*, for the Respondent, presents a totally different scenario from the present one in that Ecuador sought payment under a new law which was at issue in that arbitration, and the tribunal held that the criminal proceedings should be suspended since they stemmed from the non-payment under the new law.[97] Here, to the contrary, the Claimants have no ongoing investments in Indonesia and they only seek monetary relief, not specific performance. In addition, the Respondent argues that it has a right to conduct "legitimate criminal investigations of serious allegations of forgery that arose prior to the start of these arbitration proceedings".[98]

54. To sum up, the Respondent submits the following:

> "In this case, the alleged aggravating circumstances consist of a criminal investigation of a non-party to this dispute and the purported harassment, mental anguish and intimidation that Claimants claim to be suffered by their witnesses and 'potential witnesses'. In truth, Claimants have not even been interviewed. Nor have Claimants supplied any evidence, much less an affidavit or statement from any of their witnesses, that they are unwilling or unable to testify in the arbitration. There can be no relief for aggravation of the dispute if no aggravation has been demonstrated".[99]

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[94] Response, ¶ 60, referring to *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order, 23 January 2007, ICJ Reports 2007, p. 16, ¶ 49.

[95] Response, ¶ 61, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 138 (**Exh. CLA-170**).

[96] Response, ¶ 63, citing *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 51 (**Exh. CLA-173**).

[97] Rejoinder, ¶ 54, referring to *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 63 (**Exh. CLA-181**).

[98] Rejoinder, ¶ 55.

[99] Rejoinder, ¶ 57.

iii. The right to the procedural integrity of the arbitration

55. By invoking the right to the integrity of the arbitration as a separate ground, the Claimants "have taken on the burden of demonstrating bad faith and an illicit purpose on the part of the Republic designed, not to investigate the *bona fides* of the allegedly forged documents, but rather to frustrate Claimants' ability to prosecute their case".[100] Additionally, the Claimants must show that the mere commencement of criminal proceedings "without more, constitutes an imminent threat to their access to evidence or their witnesses" in these proceedings.[101] On both counts, the evidence before the Tribunal is insufficient to make such a showing.

56. *Quiborax*, on which the Claimants rely, must be distinguished. In that case, Bolivia initiated criminal proceedings after the ICSID proceedings had commenced as a defense strategy in the latter proceedings.[102] Unlike here, the conclusion reached by the *Quiborax* tribunal was supported by a "robust factual record",[103] *i.e.*, by documents in the criminal proceedings making express reference to the ICSID arbitration and thus showing a direct link between the two proceedings.[104] In the present case, the forgery allegations predate the commencement of the ICSID proceedings "and were the subject of long-standing governmental concern", as demonstrated by the BKP audit of February 2009 and the reiterations for clarification issued by the Regency of East Kutai "before they [i.e. the Claimants] filed their Request for Arbitration before ICSID".[105]

57. According to the Respondent, it was already apparent to the Tribunal since the filing of the Respondent's Memorial on Objections to Jurisdiction that "there are very serious questions as to the authenticity of the documents secured by Claimants' former business partners, on which Claimants rely in this proceeding".[106] The Claimants themselves acknowledged that a criminal investigation is the normal procedure by which evidence of a suspected forgery is collected.[107] The Respondent also points to the lack of plenary power of this Tribunal "to examine all persons with potential

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[100] Response, ¶ 66; Rejoinder, ¶ 44.
[101] *Id.*
[102] Response, ¶ 67, referring to *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶¶ 119, 121 (**Exh. CLA-170**).
[103] Rejoinder, ¶ 45.
[104] Response, ¶ 67.
[105] Response, ¶ 68.
[106] Response, ¶ 69.
[107] *Id.*

knowledge of the true facts" and to compel the production of evidence from persons employed by the Claimants or Ridlatama, other than the Claimants' witnesses in these proceedings:[108] "Just as the Tribunal has its own role in resolving the treaty dispute over which it has assumed jurisdiction, so too does the Republic have a responsibility to adhere to its internal law enforcement procedures in investigating and prosecuting conduct in violation of its domestic laws. Surely, Claimants have no protectable right to immunize or shelter entities or persons who have committed crimes".[109]

58. The present case must be further distinguished from *Quiborax* for the following reasons.

59. First, Indonesia's conduct in initially holding off the investigation is the "polar opposite" of Bolivia's behavior in *Quiborax*.[110] The forgery allegations were made by a Governmental audit body, not lead counsel in the present proceedings. Counsel's comments during the hearing on jurisdiction "reflected a legal determination by counsel that an investigation should be deferred, not because it was unwarranted, but rather because of a concern that it would lead to very sorts of reckless allegations made by Claimants in their Application".[111] For Indonesia, regardless of the Tribunal's rulings on jurisdiction, there can be no doubt that a criminal investigation would have been set in motion.[112]

60. Second, the facts underlying *Quiborax* are different from the present ones. The Claimants here have full access to their books and records, as well as to all the documents and testimony provided by their witnesses. The Claimants do not allege being deprived of their documentation as a result of the investigation; they "have enjoyed full freedom in presenting their case".[113]

61. Third, the Claimants are wrong in arguing that, like in *Quiborax*, the criminal proceedings were initiated by the Government officials who are mandated with Indonesia's defense in this arbitration. While the Government of the Regency of East Kutai is the complaining party, it is not the investigative body in the ongoing

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108 *Id*.
109 *Id*.
110 Response, ¶ 70.
111 *Id*.
112 *Id*.
113 Response, ¶ 71.

investigation and the Minister of Law and Human Rights of the Republic was not involved in filing the criminal complaint nor is he responsible for the investigation or prosecution of any suspected crimes. In sum, "the fact that certain government officials may have relevant knowledge and interest in this Arbitration as a result of their ordinary scope of authority is hardly grounds for insinuating interference".[114]

62. Finally, the Claimants have offered nothing to explain why the mere commencement of an investigation of Ridlatama has put an "intolerable pressure" on the Claimants' witnesses or potential witnesses leading them to withdraw from this arbitration. Provisional measures cannot be issued on the basis of speculation; they require a showing of imminent harm.[115]

b. Urgency

63. The Respondent cites commentators and decisions pursuant to which provisional measures are only indicated "if it is impossible to wait for a specific issue to be settled at the merits stage".[116] The Respondent stresses that the Claimants recognize that urgency requires more than harm, namely a showing of a real risk of imminent harm.[117] This follows from the Claimants' argument that the harm to their witnesses is imminent because criminal charges have been lodged against the Ridlatama group and therefore charges against the Claimants are "likely to follow".[118] The Respondent contends, however, that "there is no evidence that any such charges have been asserted against either the Ridlatama principals or Claimants' witnesses".[119] It adds that nothing in the ongoing investigation prevents the Claimants from presenting evidence in these proceedings.

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[114] Response, ¶ 72.

[115] Rejoinder, ¶ 46.

[116] Rejoinder, ¶ 26, citing *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 67 (**Exh. CLA-181**).

[117] Rejoinder, ¶ 26, also referring to *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶ 89 (**Exh. CLA-183**); *Burimi v. Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, 3 May 2012, ¶¶ 34-35 (**Exh. RLA-130**).

[118] Rejoinder, ¶ 27.

[119] *Id.*

c. Necessity

64. Relying on *Occidental Petroleum* and *Cemex*, the Respondent argues that irreparable harm is an essential requirement, which tribunals have found to be missing "where the alleged prejudice or harm can be compensated by damages".[120] The applicable test therefore is whether, absent provisional measures, the Claimants would lose the ability to recover monetary damages.[121] For instance, the *Plama* tribunal refused to order the discontinuance of insolvency proceedings, accepting that harm is not irreparable if it can be made good through damages.[122] The "same is true where there is no ongoing contractual relationship that Claimants seek to maintain and the remedy sought by Claimants consists solely of money damages".[123]

65. According to the Respondent, the Claimants are wrong in criticizing the irreparable harm test and arguing instead for a test of significant harm, the latter having only been applied in exceptional cases to preserve ongoing contractual relationships where the harm could not be remedied by damages.[124] As stated in *Cemex*, the tribunals in *City Oriente*, *Perenco*, and *Burlington* "could have based their decision on the fact that, the destruction of the ongoing concern that constituted the investment, would have created an 'irreparable harm'".[125] In any event, although they deny the need for irreparable harm, the Claimants nonetheless argue – albeit erroneously – that the initiation of the criminal investigation does meet that standard.

66. In respect of the "extraordinary stress and mental anguish" to which the Claimants' witnesses are allegedly subject, the Claimants fail to identify any actual or imminent harm. As in *Occidental*, the Tribunal should refrain from ordering provisional

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[120] Response, ¶ 45, referring to *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, ¶¶ 59, 61 (**Exh. CLA-183**); *Cemex v. Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶¶ 47-49 (**Exh. RLA-138**).

[121] Response, ¶ 49.

[122] Response, ¶ 46, referring to *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005, ¶¶ 33-34 (**Exh. CLA-172**).

[123] Response, ¶ 47.

[124] Rejoinder, ¶ 29, referring to *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶¶ 59-60 (**Exh. CLA-181**); *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) ("Perenco v. Ecuador & Petroecuador")*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 46, 53 (**Exh. CLA-169**); and *Burlington v. Ecuador,* ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 83 (**Exh. CLA-173**).

[125] Rejoinder, ¶ 30, citing *Cemex v. Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 55 (**Exh. RLA-138**).

measures that would cause irreparable harm to the other party, specifically to a sovereign State's power to investigate and prosecute criminal behavior: "However anxiety-provoking the fear of the unknown may be – so the Respondent submits –, the trepidation of Claimants' witnesses as to what may occur in the investigation is inherently speculative, and cannot be the basis for provisional measures that would have the effect of halting a legitimate investigation into conduct in violation of Indonesia's law".[126] Contrary to the Claimants' submission, suspending the investigation for an indefinite period of time "would be highly prejudicial to the Republic and to the integrity of the criminal justice system".[127]

III. ANALYSIS

1. Legal Framework

67. Article 47 of the ICSID Convention and Rule 39 of the 2006 ICSID Arbitration Rules enable the Tribunal to recommend provisional measures. Article 47 of the ICSID Convention reads as follows:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

68. Rule 39 of the ICSID Arbitration Rules provides in relevant parts the following:

> (1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified

[126] Response, ¶ 48 (emphasis in the original).
[127] *Id.*

in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[…]

2. Requirements for Provisional Measures

69. According to Rule 39 of the ICSID Arbitration Rules, the request must specify "the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures". Various ICSID tribunals have interpreted these requirements to mean that provisional measures must (i) serve to protect certain rights of the applicant, (ii) meet the requirement of urgency; and (iii) the requirement of necessity, which implies the existence of a risk of irreparable or substantial harm.[128]

70. While there is common ground between the Parties on the first two requirements, they disagree on whether the third requirement entails a showing of irreparable harm as opposed to substantial harm. The Parties further disagree on the fulfillment *in casu* of the three requirements referred to above, specifically whether the rights for which protection is sought are affected (a. below) and whether the measures requested are urgent (b. below) and necessary (c. below).

71. Before addressing these requirements, the Tribunal stresses that the applicant must establish the requirements with sufficient likelihood, without however having to actually prove the facts underlying them. Moreover, the Tribunal's assessment is necessarily made on the basis of the record as it presently stands and any conclusion reached in this order could be reviewed if relevant circumstances were to change.

[128] See *Plama v. Bulgaria*, Order on Provisional Measures of 6 September 2005, ¶ 38; *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 51 (**Exh. CLA-173**); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/02, Decision on Provisional Measures of 26 February 2010, ¶ 113 (**Exh. CLA-170**); *Iona Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Claimants' Application for Provisional Measures of 2 March 2011, ¶ 12.

a. Existence of Rights Requiring Preservation

72. The Claimants allege that the following three rights need preservation by way of provisional measures: (i) the right to the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention; (ii) the right to the preservation of the *status quo* and the non-aggravation of the dispute; and (iii) the right to the procedural integrity of the arbitration.

73. As a preliminary matter, the Tribunal will deal with Indonesia's contention that the rights that may be protected by way of provisional measures must belong to a Party, must exist at the time of the Application, and must not be hypothetical or future rights ((i) below). The Tribunal will then review the right to the exclusivity of the ICSID proceedings ((ii) below), the right to the preservation of the *status quo* and non-aggravation of the dispute ((iii) below), and the right to the integrity of the arbitration ((iv) below).

i. The holder of the rights requiring protection

74. Although Indonesia does not dispute that the three rights invoked by the Claimants may be protected by way of provisional measures, it argues that under Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules, provisional measures may only be issued if the rights of a disputing party are at issue.[129] Relying in particular on *Maffezini*, the Respondent further argues that such rights "must be actual, existing rights at the time the request is made and 'must not be hypothetical, nor are ones to be created in the future'".[130]

75. According to the Respondent, the Claimants preemptively seek to protect not only themselves, but also their witnesses and "any person associated with the Claimants' operations in Indonesia", i.e. the Claimants' current and former employees, affiliates or business partners. The Claimants therefore seek protection of an indefinite number of third parties, making it impossible to determine in what way the Claimants' ability to present their case is affected.

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[129] Response, ¶ 35.

[130] Response, ¶ 35, citing *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, 28 October 1999, ¶ 13 (**Exh. CLA-177**).

76. According to the Respondent, the Tribunal has no jurisdiction under Article 47 of the ICSID Convention to grant provisional measures to protect the rights of the Ridlatama companies and their principals. The same applies to other non-parties in this arbitration, "including entities or individuals who previously were associated with Claimants or who have [appeared] or may appear as witnesses in this Arbitration".[131]

77. In response, the Claimants argue that they are the owners of the rights for which they seek protection, not third parties. They further maintain that these rights stand to be violated by the Respondent vis-à-vis actual and potential witnesses.

78. It is common ground in the ICSID framework that the rights to be protected by provisional measures must belong to a disputing party. This derives from the plain words of Article 47 of the ICSID Convention, which refers to the preservation of "the respective rights of either party". It is also clear from Rule 39(1) of the Arbitration Rules which allows a disputing party to request provisional measures "for the preservation of *its* rights" (emphasis added).

79. In the view of the Tribunal, the Claimants are not seeking provisional measures to protect rights of non-parties. Rather, they seek to protect their own rights in the present proceedings. More specifically, the Claimants seek to secure their right to provide evidence through witness testimony. To this end, they seek to avoid that such right be impaired by criminal investigations brought against actual and potential witnesses. The fact that the Claimants seek to protect their right to submit evidence through potential witnesses does not make this right hypothetical.

ii. The right to exclusivity of the ICSID proceedings

80. The Claimants argue that resort to criminal investigation and prosecution is contrary to Article 26 of the ICSID Convention, thus rendering provisional measures necessary to preserve the exclusivity of the ICSID proceedings. More specifically, the forgery allegations now investigated in Indonesia are part of the subject matter of the present dispute since these allegations appear to be Indonesia's defense strategy.

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[131] Response, ¶ 38.

81. For its part, the Respondent replies that the remedies sought in the criminal investigation and this arbitration are distinct. It also refers to *Quiborax*, where the tribunal refused to hold that criminal proceedings threaten the exclusivity of ICSID proceedings.

82. Article 26 of the ICSID Convention reads in relevant part as follows:

> "Consent of the Parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".

83. It is undisputed that the exclusivity of ICSID proceedings is a procedural right which may find protection by way of provisional measures under Article 47 of the ICSID Convention. As stated in *Tokios Tokéles*:

> "Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative".[132]

84. The question which the Tribunal must address is whether the criminal investigation initiated in March 2014 as a result of the criminal charges lodged by the Regent of East Kutai on 21 March 2014 against the Ridlatama companies threatens the exclusivity of the present proceedings. The Tribunal must also determine whether the threat of criminal investigation and proceedings against the Claimants, their witnesses and potential witnesses breaches Article 26 of the ICSID Convention.

85. As a starting point, the Tribunal agrees with the *Quiborax* tribunal in that criminal proceedings do not *per se* threaten the exclusivity of ICSID proceedings.[133] This derives from the fact that the jurisdiction of the Centre and the competence of the Tribunal extend to investment disputes, i.e. for present purposes, whether the Respondent breached its international obligations under the UK-Indonesia BIT with

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[132] *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005, ¶ 7 (**Exh. CLA-176**). *See* further, *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 127 (**Exh. CLA-170**); *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 57 (**Exh. CLA-173**).

[133] *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 128 (**Exh. CLA-170**).

respect to Churchill Mining and under the Australia-Indonesia BIT with respect to Planet Mining, and not to criminal proceedings, which fall outside the scope of the Centre's jurisdiction and the Tribunal's competence.

86. A breach of Article 26 of the ICSID Convention only occurs if a claim or right forming part of the subject matter of these proceedings is the object of parallel proceedings in another forum. In the present case, the subject matter of the criminal proceedings (to impose sanctions for the alleged criminal act of document forgery) and of the present arbitration (to grant monetary relief for alleged breaches of the investment treaty) are not the same. It is true that the Tribunal may have to consider documents allegedly forged in the context of its power to determine the admissibility and evidentiary weight of the evidence on record. Yet, this does not imply an identity of subject matter.[134]

87. In this light, the Tribunal finds that the criminal charges lodged by the Regent of East Kutai on 21 March 2014 against the Ridlatama companies do not threaten the exclusivity of the ICSID proceedings. The Ridlatama companies are not parties to the present dispute, and a criminal investigation into their conduct with respect to the alleged document forgery does not impinge on the exclusivity of the present proceedings, nor does it undermine the Tribunal's jurisdiction to resolve the Claimants' claims.

88. The Tribunal also notes that no criminal proceedings have (yet) been instituted against the Claimants, their witnesses or potential witnesses. In these circumstances, there can be no question of a breach of Article 26 of the ICSID Convention. The threat to initiate criminal proceedings voiced by Counsel, if it can be characterized as such, cannot change this conclusion.

iii. The right to the preservation of the status quo and the non-aggravation of the dispute

89. The Claimants argue that the Respondent is employing criminal proceedings or related threats to intimidate the Claimants and their witnesses or potential witnesses, thus altering the *status quo* and aggravating the dispute. In particular, the Claimants contend

[134] *Perenco v. Ecuador & Petroecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 61 (**Exh. CLA-169**).

that Indonesia's "recurrent threats" of criminal investigations cause "extraordinary stress and mental anguish to the Claimants and their witnesses",[135] and presumably to "all persons currently or previously associated with the Claimants' investment in Indonesia".[136] For its part, Indonesia retorts that the Claimants have failed to explain how the criminal proceedings have altered the *status quo* or aggravated the dispute such as to affect the Claimants' ability to present their case. Nor have the Claimants established that the requested measures are urgent and necessary.

90. It is undisputed that the right to the preservation of the *status quo* and the non-aggravation of the dispute may find protection by way of provisional measures. As was held in *Burlington*, procedural rights may be preserved by provisional measures like substantive rights.[137] The Tribunal agrees with previous decisions holding that within the ICSID framework the right to the preservation of the *status quo* and the non-aggravation of the dispute is a self-standing right vested in any party to ICSID proceedings.[138]

91. The Tribunal now turns to the question whether Indonesia's actions have altered the *status quo* or aggravated the dispute. It notes the Claimants' allegation that the "continued harassment and intimidation" exerted by the Respondent targets three different groups of persons: the Claimants themselves; the Claimants' witnesses; and persons currently or previously associated with the Claimants' investment in Indonesia. The Tribunal will thus focus on each group of persons separately.

92. The Tribunal agrees with the Claimants that the threat or the initiation of criminal charges is not conducive to lowering the level of antagonism between the Parties. For the following reasons, the Tribunal does not find, however, that Indonesia's (intended) actions have altered the *status quo* or aggravated the dispute. With regard to the first two groups, the Tribunal notes that no investigation has been initiated nor have criminal charges been lodged against the Claimants or their current witnesses. The Tribunal further fails to see how the initiation of a criminal investigation against the

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135 Application, ¶ 47.

136 *Id.*

137 *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, ¶ 60 (**Exh. CLA-173**).

138 *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 55 (**Exh. CLA-181**); *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 134 (**Exh. CLA-170**).

Ridlatama companies which are not parties to the present dispute, has altered the *status quo* or aggravated the dispute in the present proceedings. While it is undeniable that the criminal charges lodged against the Ridlatama companies are related to the present arbitration, the Tribunal does not believe at this juncture that the Claimants' rights are affected.

93. As regards the "extraordinary stress and mental anguish" allegedly suffered by the Claimants and their witnesses, due to Indonesia's conduct, the Tribunal does not either find the initiation of criminal proceedings against Ridlatama to have altered the *status quo* or to have otherwise aggravated the dispute. There is no element on record showing any pressure or intimidation against the Claimants and their witnesses.

94. As regards Mr. Benjamin, it is true that counsel to Indonesia argued at the hearing on jurisdiction that he may have to respond to the Indonesian authorities about his involvement in the compilation of the documents the authenticity of which Indonesia now questions. However, there are no concrete elements in the record allowing to conclude that Indonesia is indeed contemplating the possibility of initiating a criminal investigation against Mr. Benjamin. In its latest submission, Indonesia stated that Mr. Benjamin was not accused of forgery at the hearing or thereafter by Indonesian authorities.[139] While Mr. Benjamin may have to appear as a witness in the investigation initiated against the Ridlatama companies in light of his personal role in the collection of the documents that are now under investigation, this does not mean, absent further elements, that Mr. Benjamin is subject to undue pressure.

95. With respect to the third group, the Tribunal equally fails to see how the threat to initiate criminal investigations or proceedings against the unidentified third group of persons "being currently or previously associated with the Claimants' investment in Indonesia" has changed the *status quo* and aggravated the dispute.

iv. The right to the procedural integrity of the arbitration proceedings

96. The Claimants contend that the Respondent's conduct impairs their right to the procedural integrity of these proceedings, in particular their "fundamental due process

[139] Rejoinder, ¶ 19.

right" to present their case. In light of (i) the direct connection between Indonesia's conduct and the developments in these ICSID proceedings, (ii) the identity between the persons initiating the criminal investigation and those defending Indonesia in the present proceedings, and (iii) the timing of the Respondent's conduct, there is a clear and imminent threat to the procedural integrity of these proceedings.

97. The Respondent answers that the Claimants have failed to demonstrate bad faith or an illicit purpose on the part of Indonesia, not to investigate the *bona fides* of the alleged document forgery, but to frustrate the Claimants' ability to present their case. Nor did the Claimants show that the mere commencement of the criminal investigation constitutes an imminent threat to their access to evidence or to their witnesses.

98. The Parties do not disagree that the right to the integrity of arbitration proceedings may be protected by provisional measures. Both Parties rely on the *Quiborax* decision to reach opposite conclusions; the Claimants arguing that *Quiborax* is directly analogous to the present case, and the Respondent arguing that both cases must be distinguished.

99. While presenting certain similarities, the Tribunal is of the view that *Quiborax* must be distinguished, since it dealt with actual criminal investigations against a co-claimant and persons involved in the setting up of the investment. As matters presently stand, the Tribunal considers that the impairment of the Claimants' procedural rights is speculative and hypothetical. .

b. Urgency

100. The Parties agree that the urgency requirement is satisfied if the relief requested cannot await the final award. They disagree, however, on whether this test is met in the present circumstances..

101. Since the specific circumstances as they stand do not affect the Claimants' right to the exclusivity of the ICSID proceedings, their right to the preservation of the *status quo* and non-aggravation of the dispute, and their right to the procedural integrity of these proceedings, it follows that the urgency requirement is not fulfilled.

c. Necessity

102. While the Parties agree that provisional measures must be necessary to avoid harm being inflicted upon the applicant, they disagree on the characterization of the harm. The Claimants argue that a risk of substantial harm is sufficient, while the Respondent insists on irreparable harm. The Respondent also contends that harm is not irreparable if it can be made good through damages.

103. The Tribunal can dispense with entering into a discussion of the Parties' arguments. Since in the present circumstances, the rights for which the Claimants seek provisional measures are not affected, the necessity requirement is consequently not fulfilled.

d. Final Observations

104. While the request for provisional measures must be denied, the Tribunal wishes to expressly stress the Parties' general duty, which arises from the principle of good faith, not to take any action that may aggravate the dispute or affect the integrity of the arbitration.

105. The Respondent requests the Tribunal that "the Republic be awarded the costs associated with its opposition thereto, including its legal and administrative fees and expenses and the fees and expenses of the Tribunal".[140] Considering that it was not unreasonable under the circumstances to file the Application and in line with the practice adopted in earlier decisions and orders, the Tribunal will reserve the issue of costs for a later determination.

IV. ORDER

106. On this basis, the Arbitral Tribunal issues the following decision:

    (1) Denies the Claimants' Application for provisional measures;

    (2) Costs are reserved for a later decision or award.

[140] Response, ¶ 76; Rejoinder, ¶ 64.

On behalf of the Tribunal

[*Signed*]

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Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 8 July 2014